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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 101

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 102

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court in No. 101 (A. 10–14) is reported as *City of Chicago* v. *United*

States, 294 F. Supp. 1103. The report of Division 3 of the Interstate Commerce Commission in that case (A. 19–40) appears at 331 I.C.C. 447. The opinion of the district court in No. 102 (A. 15–16) is reported as *Tennessee Public Service Commission* v. *United States,* 294 F. Supp. 1106. The report of Division 3 of the Interstate Commerce Commission in that case (A. 48–66) appears at 333 I.C.C. 720.

JURISDICTION

The judgments of the district courts in both cases (A. 14, 16), were entered January 8, 1969. The notices of appeal were filed March 6, 1969, probable jurisdiction in both cases was noted June 16, 1969, and the cases were consolidated. The jurisdiction of this Court to review the judgments below on direct appeal is conferred by 28 U.S.C. 1253 and 2325. *United States* v. *Drum,* 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States,* 351 U.S. 56.

QUESTION PRESENTED

Whether the Interstate Commerce Commission's findings and decision after hearing, allowing discontinuance of a railroad train pursuant to Section 13a(1) of the Interstate Commerce Act, are judicially reviewable upon the complaint of interested parties objecting to loss of service.

STATUTES INVOLVED

Section 13a of the Interstate Commerce Act, as added by Section 5 of the Transportation Act of 1958, 72 Stat. 571, 49 U.S.C. 13a, provides:

> (1) A carrier or carriers subject to this chapter, if their rights with respect to the discon-

tinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one state to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in

operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or

where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

359-159—69——2

28 U.S.C. 1336(a) provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

The introductory clause of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 701(a), provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

Section 10(a) of the Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV) 702, provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT

These are direct appeals from two final orders of a three-judge district court which, after a joint hearing, dismissed for lack of jurisdiction suits brought by appellants to review decisions of the Interstate Commerce Commission allowing the appellee railroads to discontinue certain trains.

Each decision by the Commission followed a hearing and took the form of an order terminating a

Commission investigation of the proposed discontinuance, instituted pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)). In *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains, etc.*, 331 I.C.C. 447 (No. 101, A. 19–40), the Commission found that the continued operation of Chicago & Eastern Illinois Railroad Company's passenger trains Nos. 93 and 54 between Chicago and Evansville, Indiana, was not required by public convenience and necessity and that continued operation thereof would unduly burden interstate commerce. In *Louisville and Nashville Railroad Company—Discontinuance of Trains, etc.*, 333 I.C.C. 720 (No. 102, A. 48–66), the Commission made the same findings with respect to passenger trains Nos. 6 and 7 operated by the Louisville and Nashville Railroad Company between New Orleans and Cincinnati.

The appellants in No. 101 instituted an action before a three-judge court in the Northern District of Illinois seeking review of the Commission's decision with respect to the Chicago & Eastern Illinois discontinuance, and the appellants in No. 102 instituted a separate but similar action before the same three-judge court with respect to the Louisville & Nashville discontinuance. All of the appellants—which are cities, state regulatory agencies and other interested parties—had been parties to the Commission proceedings sought to be reviewed. The defendant railroads objected that the nature of the Commission's decisions made them unreviewable; the United States and the Interstate Commerce Commission, although defend-

ants, agreed with the appellants in their threshold contention that the court did have jurisdiction to review. Following a joint hearing, the district court on January 8, 1969, dismissed both suits, holding that decisions terminating investigations under Section 13a(1) are not "orders" within the meaning of 28 U.S.C. 1336(a), which provides for review of "any order" of the Commission (see A. 14, 16). Accordingly, the merits of the Commission's decisions were not considered in the district court and are not in issue here.

ARGUMENT

INTRODUCTION AND SUMMARY

Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. 13a(1), provides that a railroad desiring to discontinue the operation of an interstate train may post and file a notice at least 30 days in advance of the proposed discontinuance. During the 30 day period the Interstate Commerce Commission may institute an investigation of the proposed discontinuance and may require the railroad to continue the operation of the train, "pending hearing and decision in such investigation," for not longer than four months after the proposed discontinuance would have become effective. "If, after hearing in such investigation * * * the Commission finds that the operation or service of such train * * * is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require [its] continuance * * *" (or restoration, if the four month period has expired) for not more than

one year from the date of its order. If the Commission does not require continuance, either with or without such an investigation, the train may be discontinued without regard to any state requirement.

Under 28 U.S.C. 1336(a) "any order" of the Interstate Commerce Commission is subject to judicial review. Since Section 13a(1) provides that the Commission may block a discontinuance "by order," it is clear that a railroad has the right to review if the outcome of the Commission's investigation is adverse to it. The question here is whether an order, issued with findings and conclusions of law terminating an investigation and thus in effect approving a discontinuance, is also an "order" reviewable under Section 1336(a), so that an interested party opposed to discontinuance has the same right to judicial review of decisions adverse to it. The district courts have disagreed on that question.[1] We believe that all determinations after investigation under § 13(a) are reviewable, whether the aggrieved party is a carrier or an opponent of discontinuance, and accordingly that the decision of the court below should be reversed.

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[1] In two cases, *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D. Minn.), and *State of New Hampshire* v. *Boston and Maine Corporation*, 251 F. Supp. 421 (D.N.H.), the courts held—as did the court below—that Commission orders terminating Section 13a(1) investigations after hearing are not "orders" within the meaning of the judicial review statute. These decisions are directly contrary to subsequent decisions of three-judge district courts in *State of Vermont* v. *Boston and Maine Corporation*, 269 F. Supp. 80 (D. Vt.); *City of Williamsport* v. *United States*, 273 F. Supp. 899 (M.D. Pa.), 282 F. Supp. 46, affirmed *per curiam*, 392 U.S. 642; and *State of New York* v.

The presumption expressed in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, that administrative decisions are reviewable is not rebutted by any expression of congressional intent to forbid review of a Commission determination, after a full hearing, not to stop a proposed interstate train discontinuance. The opposite decision would be reviewable upon suit by the railroad, as would a Commission decision either way applying the identical substantive standard under the somewhat different procedure governing discontinuance of intrastate trains. See Section 13a(2), 49 U.S.C. 13a(2). There is no justification for an anomalous and inequitable denial of the right to judicial enforcement of the statutory standard to opponents of interstate discontinuances, alone. Equal weight should be given to both the needs of the railroads and the public interests asserted by such opponents in determining the question of reviewability, as it is in the substantive standards that the Commission must apply. Moreover, the conceptual

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United States, N.D.N.Y., No. 67-CV-207, appeal pending, No. 100, O.T., 1969. After the decisions in the instant cases were rendered by the court below, a different panel of three judges in the Northern District of Illinois (Swygert, C.J., Hoffman, and Marovitz, D.J.J.) denied a similar motion to dismiss a suit to review a Commission order of the same kind (*City of Chicago* v. *United States*, N.D. Ill., No. 68 C 2184, decided June 2, 1969).

It is well settled that a decision of the Commission not to enter into an investigation of a proposed discontinuance is not reviewable, since that decision is committed to the exclusive discretion of the Commission. *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J.), affirmed *per curiam*, 359 U.S. 27; *Sludden* v. *United States*, 211 F. Supp. 150 (M.D. Pa.); *City of Williamsport* v. *United States*, *supra*, at 902, note 5.

arguments made against reviewability—that nothing more than agency "inaction" is involved since Section 13a(1) is "self-implementing" unless the proposed discontinuance is disapproved and, alternatively, that termination of an investigation is simply an extension of the Commission's unreviewable discretion not to investigate at all—do not withstand realistic analysis. When the Commission decides to investigate, it undertakes to decide whether the discontinuance is consistent with the statutory standard, and an affirmative answer to that question is just as much a decision on the merits as is a negative answer. The fact that an affirmative answer technically results in an order terminating the investigation rather than an order directing someone to do something or dismissing a complaint is, therefore, irrelevant to the question of reviewability.[2]

THERE IS NOTHING IN THE STATUTORY SCHEME ESTABLISHED BY SECTION 13a(1) OR IN ITS LEGISLATIVE HISTORY THAT NEGATES THE PRESUMPTIVE RIGHT TO JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION DECISIONS, AFTER HEARING, ALLOWING DISCONTINUANCES OF INTERSTATE TRAINS

A.

In these cases, the question for decision is, like that in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, whether

[2] While the Commission has recommended legislation removing any doubt as to the reviewability of orders entered after hearings refusing to continue train serivce, it has also advised Congress that it reads the existing statute as permitting judicial review of such orders on complaint of an aggrieved party. Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on S. 1175, 90th Cong., 1st Sess. 11–12, 21–23.

Congress in enacting Section 13a(1) intended to forbid all review of a Commission decision after investigation allowing discontinuance of an interstate train. The appellants, which are chiefly governmental entities and which represented before the Commission the interests of those served by the discontinued trains, plainly have sufficient standing as aggrieved parties to invoke judicial review if it is available at all. Thus the only question presented is that of reviewability and, as the Court put it in *Abbott Laboratories,*

> The question [of reviewability] is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. * * * [T]he Administrative Procedure Act * * * embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). * * * [O]nly upon a showing of "clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. * * * [387 U.S. at 140–141.[3]]

[3] The Administrative Procedure Act was, of course, intended to apply to the Interstate Commerce Commission. *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, 478 (D. Ore.), modified, 134 F. Supp. 210 (D. Ore.).

The railroad defendants in these cases argue that judicial review of favorable discontinuance decisions is inconsistent with the underlying congressional purpose to facilitate discontinuances in appropriate circumstances, and the court below accepted this argument. As we shall show, however, neither the legislative history nor the statutory scheme supports this proposition.

Section 13a(1), relating to discontinuance of interstate trains, and its companion Section 13a(2), relating to discontinuance of intrastate trains, originated as Section 5 of the Transportation Act of 1958, 72 Stat. 571. The purpose of the enactment was to establish a uniform federal scheme to supersede the confused, delayed and often inconsistent state procedures and results to which railroads were required to submit before discontinuing passenger trains.[4] In reporting upon the bill from which Section 5 of the Act was derived, a subcommittee of the Senate Committee on Interstate and Foreign Commerce observed (S. Rep. No. 1647, 85th Cong., 2d Sess. 22):

> Without reciting individual cases the subcommittee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discon-

[4] It had been held that authorization of a train discontinuance was not within the Commission's power because it was not an abandonment of a line within Section 1(18) of the Act, 49 U.S.C. § 1(18). See *Board of Public Utility Commissioners of New Jersey* v. *United States*, 158 F. Supp. 98 (D.N.J.), vacated and remanded with instructions to dismiss for mootness, 359 U.S. 982.

> tinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit. In many cases, State regulatory commissions have shown a definite lack of appreciation for the serious impact on a railroad's financial condition resulting from prolonged loss-producing operations.

The report concluded with a proposed remedy:

> To improve this situation, the subcommittee proposes to give the Interstate Commerce Commission jurisdiction in the field of discontinuance or change of rail services and facilities similar to the jurisdiction it now has over intrastate rates under section 13 of the Interstate Commerce Act so that when called upon to do so it may deal with such matters that impose an undue burden on interstate commerce. This, the subcommittee believes, would protect and further the broad public interest in a sound transportation system and would prevent undue importance being attached to matters of a local nature. [*Ibid.*]

Similar considerations were expressed in the House Report, H. Rep. No. 1922, 85th Cong. 2d Sess. 11–12. See also the remarks of Senator Smathers, 104 Cong. Rec. 10851–10852.

In order to achieve this legislative purpose, Congress established a single federal standard for permitting train discontinuances. This standard is "precisely the same" for both intrastate and interstate trains (despite some minor variations in language between Sections 13a(1) and 13a(2)), *Southern R. Co.* v. *North Carolina,* 376 U.S. 93, 103, and it requires "that the Commission balance the public need for the serv-

ice against the deficit resulting from it", *id.* at 102.[5] The bill as originally reported by the Senate Committee would have required the Commission to permit discontinuance of an operation upon a mere showing that the operation produced a deficit, regardless of the public need for the operation. An amendment requiring the Commission to balance the public need against the deficit was rejected in the Senate, but a similar amendment was adopted in the House and accepted by the Senate in conference. See *id.* at 101–102. Thus, Congress specifically focussed on the need to consider the public interest in both intrastate and interstate discontinuances, concluding that public concerns (such as those asserted by the appellants in these cases) should be given as much weight as the economic needs of the railroads.

Taking into account the differing governmental interests in interstate cases and those involving trains running wholly within the borders of a single state, Congress established somewhat different procedures to be followed by the Commission in each of the two situations. Section 13a(2) provides that a carrier may obtain federal authority to discontinue an intrastate train only after state relief has been denied or unduly delayed and the ICC has held a hearing on the carrier's petition; the result is ICC findings and an

[5] The *North Carolina* case dealt with the substantive standards to be applied by the Commission in an intrastate case. Substantive standards of review are, of course, not involved in the instant cases in their present posture and we are not to be understood to make any concessions in this brief with respect to the merits of the discontinuances to which the appellants object.

order specifically authorizing the discontinuance. With respect to interstate trains, on the other hand—as to which there is traditionally weaker state interest and stronger federal interest—Section 13a(1) makes discontinuance procedurally easier for the railroads. There is no requirement of resort to state authorities at all and the carrier need do no more than post and file with the ICC thirty days' advance notice of the proposed discontinuance; the discontinuance then takes effect automatically unless the Commission (1) determines in its discretion to institute an investigation (with or without a four-month stay of the discontinuance) and (2) concludes after hearing in the investigation that continuance of the train is required. As we have noted, the substantive standard to be applied by the Commission if it has a hearing upon investigation under Section 13a(1) has been held by this Court to be "precisely the same" as that to be applied in the hearing upon a petition filed by a carrier pursuant to Section 13a(2). And any investigation, once initiated, is governed by 49 U.S.C. 14(1), which provides in pertinent part:

> Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises * * *.

Thus, it is plain that once the Commission has taken the discretionary step of instituting an investigation under Section 13a(1), the proceeding that ensues before the Commission can differ little, if at

all, from the proceeding that would follow a petition under Section 13a(2). In each case the Commission is required to apply the same substantive standard, and in each case it is required to hold a hearing followed by an opinion stating its conclusions and decision.[6] The only difference if the railroad prevails before the Commission is that the 13a(2) proceeding results in an order authorizing discontinuance while the 13a(1) proceeding results in an order terminating the investigation and hearing initiated with a view to forbidding discontinuance; conversely, if the railroad loses, the 13a(2) result is a denial of the railroad's petition while the 13a(1) result is an order requiring continuance or restoration of service. We perceive no reason why any one of these four results should be any less subject to judicial review than the others; Congress was plainly equally concerned that all of these decisions should be in conformity with the common substantive standard. In three of these situations judicial review is undisputably available to the losing party—in both situations where the railroad loses and in the case of grant of a 13a(2) petition (assuming the protestant has the requisite

[6] There is also language in Section 13a(1) which suggests that Congress in that section intended the Commission to reach a "decision" one way or the other in the normal situation where it institutes an investigation. It is provided that the Commission may suspend a discontinuance "pending hearing and decision in such investigations." This is not to say that the Commission after ordering an investigation might not decide in an exceptional case that the investigation was improvidently ordered and thereupon terminate the investigation without making a decision on the merits. The Commission has not done so here.

standing), see *Southern R. Co.* v. *North Carolina, supra.* It is, therefore, both an anomaly and a departure from "elemental fairness" to say, as did the court below, that the defeated protestant to an interstate discontinuance alone shall have no opportunity to seek enforcement of the statutory standard in court. See *State of Vermont* v. *Boston and Maine Corporation, supra,* 269 F. Supp. at 84.

There is no legislative history suggesting that Congress intended the anomalous result reached below, and indeed there is legislative history to the contrary. Thus, in proposing the substantive standard that ultimately prevailed, Senator Javits assumed that parties opposed to discontinuance, as well as disappointed railroads, would have the right to judicial review. See 104 Cong. Rec. 10848–10849. Under these circumstances, there is nothing approaching the "clear and convincing evidence" of congressional intent required to rebut the presumption of reviewability.[7]

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[7] Compare *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, in which the Court found that the statutory scheme and legislative history plainly showed an intent that Mediation Board determinations in railroad labor representation cases be completely nonreviewable.

This case also differs substantially from *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* 383 U.S. 576, where this Court held that although a shipper could sue for direct review of a Commission order denying reparations, a carrier could not sue under Section 17(9) for review of an order awarding them. The Court held that review proceedings by carriers would deny shippers procedural and substantive benefits which Congress intended them to have, and that in any event the carrier could obtain review by defending

Although Congress intended to avoid undue delay in discontinuance proceedings, it does not follow, as the court below assumed (see A. 13), that Congress meant to deny judicial review of decisions allowing discontinuance. The policy of avoiding delay can be sufficiently implemented in the district courts by the expedition of review proceedings under Section 13a(1), particularly when a court has stayed a Commission order allowing discontinuance. Moreover, such stays are not automatic; they are subject to all of the considerations customarily applied to preliminary injunctions and the applicant for them bears a heavy burden. See, *e.g., Virginia Petroleum Jobbers* v. *Federal Power Commission,* 259 F. 2d 921 (C.A.D.C.); *Eastern Air Lines* v. *Civil Aeronautics Board,* 261 F. 2d 830 (C.A. 2); *Associated Securities Corp.* v. *Securities and Exchange Commission,* 283 F. 2d 773, 774–775 (C.A. 10). In short, the carriers' concern with undue delay goes to the procedures attending the review proceeding under Section 13a(1) rather than to the question whether adversely affected passengers and communities should have a right of review at all.[8]

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against the shipper's enforcement action or by filing a cross-action in the enforcement court. If the district court's decisions here were upheld, however, passengers and communities interested in preserving train service would be wholly without remedy.

[8] The same is true of the consideration, which also influenced the court below (A. 13, see also the *Minnesota* case, 238 F. Supp. at 113), that if there is judicial review of decisions allowing discontinuance, the Commission would be discouraged (presumably for fear of delay) from investigating doubtful cases.

B.

1. There is no inconsistency between the recognized principle that a decision by the Commission not to investigate a train discontinuance under Section 13a(1) is not reviewable (*State of New Jersey* v. *United States,* 168 F. Supp. 324 (D.N.J.), affirmed *per curiam,* 359 U.S. 27) and our position here that a decision allowing a discontinuance after a full proceeding on the merits is reviewable. A decision not to investigate is nothing more than a determination that the Commission will not initiate proceedings with respect to the railroad's announced intention to discontinue. That determination is expressly committed to the agency's discretion and, absent patent abuse, is therefore unreviewable. 5 U.S.C. (Supp. IV) 701(a)(2). When, however, the Commission determines to institute an investigation and sets the matter for hearing, in effect it is determining that a substantial question exists under the statutory standards for discontinuance and undertaking to decide that question pursuant to those standards. At this point (barring the exceptional situation where the Commission might determine subsequently that the investigation was improvidently begun) the Commission's unfettered discretionary control over the case ends; it is simply unreasonable to say that the Commission has "discretion" to decide the statutory issues that it has raised otherwise than in accordance with law.[9] Putting the matter in another way, the dis-

[9] In this connection, the court below mistakenly assumed that the reports and orders entered by the Commission upon termination of the investigations in these cases were merely

cretion argument amounts to the proposition that the Commission, while having no discretion to decide *against* the railroad, has a completely unreviewable discretion to decide *in favor of* the railroad. There is, however, no basis for saying that Congress intended the scope of the Commission's discretion in the investigation and hearing process to be determined by the result it plans to reach at the end of that process.

The distinction for purposes of review between an agency's discretionary decision not to undertake an investigation and its negative determination on the merits is well established. For example, a determination by the NLRB's General Counsel not to issue a complaint is ordinarily unreviewable,[10] yet a Board decision on the merits dismissing a complaint is reviewable on petition of the unsuccessful charging party. *Auto Workers* v. *Scofield*, 382 U.S. 205, 210, 219–220. The same considerations apply here.[11]

"gratuitous" acts (A. 12). The court overlooked the specific requirements of 49 U.S.C. 14(1) in this regard, pointed out at page 16, *supra*.

[10] See *e.g.*, *Mayer* v. *Ordman*, 391 F. 2d 889 (C.A. 6); *United Electrical Contractors Assn.* v. *Ordman*, 366 F. 2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026; *Dunn* v. *Retail Clerks Int. Assn., AFL-CIO, Local 1529*, 307 F. 2d 285 (C.A. 6).

[11] Additionally, there is an analogy between Section 13a(1) and Section 15(7) of the Act (49 U.S.C. § 15(7)). Under Section 15(7) a Commission decision as to whether to suspend a new rate cannot be judicially reviewed, *Luckenbach Steamship Company* v. *United States*, 179 F. Supp. 605 (D. Del.), modified on other grounds, 364 U.S. 280, just as a decision not to investigate a proposed train discontinuance cannot be reviewed. On the other hand, it is well established that after consideration of the merits by the Commission, its final decision

2. The decision below and those of the other district courts that have taken the same view rest upon the conceptual premise that there is no decision to be reviewed when the Commission allows an interstate discontinuance after investigation and hearing because the statute is "self-implementing" in such a situation (A. 14; *New Hampshire, supra* note 1, 251 F. Supp. at 423–424; *Minnesota, supra* note 1, 238 F. Supp. at 111–112). The theory is that, while it takes a reviewable Commission order to stop a discontinuance, only Commission *inaction* is involved when the discontinuance is allowed to take effect. And inaction, in the nature of things, leaves nothing that can be reviewed.

Such conceptual reasoning ignores the realities of the situation as we have already described them. Once the Commission decides to rule upon the merits—as it did in these cases—the result obviously turns on which way the Commission resolves the merits, and the fact that the decision in form is one of whether or not to let the statute "implement itself" is immaterial. There is no reason to say that an affirmative answer to the statutory questions is "action" but a negative answer is "inaction." Either answer is a decision of the case that the Commission has undertaken to hear, a deci-

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not to set aside a new rate is reviewable. *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671.

The court in *New Hampshire, supra* note 1, erroneously reasoned that Section 13a(1) requires only an "investigation" whereas Section 15(7) requires a "hearing" (251 F. Supp. at 424). However, Section 13a(1) expressly provides that the Commission may require continuance or restore service only "after hearing in such investigation," and thus the two statutory schemes are substantially the same.

sion with palpable practical impact, and both should be equally subject to judicial review. Indeed, there is no apparent reason why the Commission's orders in these cases, rather than terminating the investigations, could not in form have stated that the discontinuances were approved and the objections raised by the protestants at the hearings were overruled. Certainly the realities of the statutory scheme would have permitted the use of such terminology, which would make more explicit the nature of the action taken. In any event, it is the operational effect of the order and the nature of the proceeding leading up to it that should determine the reviewability of the order; its technical form is irrelevant.

Stating the matter in a somewhat different way, the initiation of a formal investigation puts in doubt the statutory right of the carrier to discontinue the train. This is shown by the Commission's power to require that the train be continued for a period of four months during the pendency of the proceedings and to direct that service be resumed if the suspension has expired but the public interest is utimately found to require continuance. The Commission must then hold a hearing looking toward a decision that will either confirm or eliminate the doubt created by the initiation of the investigation. If the Commission permits the discontinuance, it is in effect issuing a declaration of the carrier's statutory rights which removes the legal cloud upon that right raised by its determination to conduct the investigation. An administrative determination which thus removes an uncertainty, though negative in form, is a declaratory

order within the meaning of the Administrative Procedure Act (5 U.S.C. (Supp. IV) 551 (6); 5 U.S.C. (Supp. IV) 554 (e))[12] and is reviewable as such (5 U.S.C. (Supp. IV) 702). See *Frozen Food Express* v. *United States*, 351 U.S. 40.

The reasoning below—and in the other cases that have reached the same result—bears a remarkable resemblance to those early cases, since overruled, which held that courts could review only "affirmative" orders of an agency and could not review "negative" orders. See, *e.g.*, *Lehigh Valley Railroad Company* v. *United States*, 243 U.S. 412; *Procter & Gamble Company* v. *United States*, 225 U.S. 282. The negative order doctrine was firmly repudiated in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125. In language that is equally applicable to the instant case, Mr. Justice Frankfurter stated for the Court (307 U.S. at 142–143):

> * * * An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action

[12] 5 U.S.C. (Supp. IV) 551(6) provides:

"(6) 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

5 U.S.C. (Supp. IV)554(e) provides:

"(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384)."

and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. * * * We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.[13]

CONCLUSION

For the foregoing reasons, the judgments of the court below should be reversed and each case remanded for determination on the merits.

Respectfully submitted.

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[13] The overruling of the negative order doctrine has been confirmed in the Administrative Procedure Act which expressly includes a "negative" order within the definition of an "order" subject to review. See 5 U.S.C. (Supp. IV) 551, 701(b)(2), 702.

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